See also Vol. 32 #41

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,577

CABLE VISION, INC., et al., *Appellants,*

vs.

THE KLIX CORPORATION, et al, *Appellees.*

PETITION FOR REHEARING

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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

The KLIX Corporation, Appellee, respectfully petitions for a rehearing in the above entitled cause and petitions that the decision entered herein on July 15, 1964 be set aside and that the judgment of the trial court be affirmed, and in support thereof, respectfully shows and alleges:

PETITION FOR REHEARING

I. The decision is erroneous in holding that copyrighted and uncopyrightable materials are in the public domain.

A. The monopoly granted the proprietor of the copyright during its term is totally inconsistent with the concept that the copyrighted material is in the public domain in any sense relevant to the instant case.

B. The holding that uncopyrightable program material necessarily is in the public domain is in conflict with the rule established in the United States Supreme Court by *International News Service v. Associated Press* (1918) 248 U.S. 215, 63 L.Ed. 211, 39 S. Ct. 68, 2 ALR 293, and cases cited therein. The holding is also inconsistent with the holding of this court in *Associated Press v. KVOS, Inc.* (CCA 9, 1935) 80 F(2d) 575, the Third Circuit in *Ettore v. Philco Broadcasting Co.* (CCA 3, 1956) 229 F(2d) 481 cert. d. 351 U.S. 826, 100 L.Ed. 1456, 76 Sup. Ct. 783, and the Second Circuit in *Capitol Records v. Mercury Records* (CCA 2, 1955) 221 F(2d) 657. Generally speaking, the most valued programs in the television industry are those which are released simultaneously with their occurrence: i.e., sporting events, network "extravaganzas", and news programs. They are uncopyrightable, not because of any want of creativity or novelty, as were the articles involved in *Compco Corp. v. Daybright Lighting* 376 U.S. 234, and *Sears Roebuck Co. v. Stiffel Co.* 376 U.S. 225, but by reason of the nature of the program content and that it is broadcast simultaneously with its creation. No federal policy precludes judicial protection of property rights in programs in this category.

C. The decision is ambiguous and inconsistent with respect to the status of property rights subject to the provisions of 17 USCA 2. Footnote 3 indicates that such programs being uncopyrighted are not protectable since protection would "counter the federal policy of free access". *Columbia Broadcasting System, Inc. v. Documentaries, Ltd.*, 32 U.S. Law Week 2516, and *Woods Associates, Inc. v. Skene,* 32 U.S. Law Week 2595, which apply the section, are cited with approval

in Point II of the Opinion. Point V indicates that a derivative statutory copyright action is the sole remedy, notwithstanding that the federal remedies are not applicable to programs in this category. The opinion should be clarified to hold that programs subject to common law copyright rules are not in the public domain; that their protection is not contrary to federal policy, and that state remedies are applicable to them because they are not reached by the Copyright Act.

D. Footnote 3 of the Opinion turns the case upon a defense never properly raised. The validity of a copyright cannot be raised for the first time on appeal. *Davilla v. Brunswick-Balke Collender Co.* (CCA 2, 1938) 94 F(2d) 567, cert. den. 58 S. Ct. 1040, 304 U.S. 572, 82 L.Ed 1536; *Johns Printing Co. v. Paull's Music Corp.* (CCA 8, 1939) 102 F(2d) 282. There was never any pleading to the effect that any of the programs were in the public domain. Appellant's opening brief in this court does not mention the subject whatever, and its Reply Brief urges not only that the record supports the trial court's finding number 8, but that " . . . proprietors of virtually all featured television programs (network or syndicated) claim statutory copyright in them". (Reply Brief, p. 8). The ownership of the original rights in all programs and the power of the program supplier to grant exclusivity through contracts were not denied. If any particular program was in the public domain, such defense should have been pleaded; not having been pleaded, it is waived. (Rule 12(h) Rules of Civil Procedure.)

E. *Compco* and *Sears* are not applicable: there the articles were in the public domain; here the programs are not in the public domain.

II. The court erred in holding that a state remedy, to-wit, an injunction for tortious interference with contractual relationships, does not apply when the subject of the contract is copyrighted material.

A. The counterclaim of The KLIX Corporation is not essentially a copyright action as characterized by this court. It invokes instead a state remedy to prevent tortious interference with the economic benefit conferred by contract.

B. Infringement of a statutory copyright is a specific distinct tort designed to afford relief to the copyright proprietor. *Leo Feist v. Young* (CCA 7, 1943) 138 F(2d) 972 and authorities cited. Interference with economic relationships arising out of contracts is an entirely different legal wrong designed to protect wholly different legal interests. That the commission of the federal tort constitutes all or a part of the means whereby the state tort is committed does not protect against liability for the latter. See cases cited in Appellee's original brief, note 39, and see comments (b) and (h) to the Restatement on Torts, Sec. 766.

C. State courts have jurisdiction and state remedies are applicable to determine all questions involving copyrights, applying contract and tort principles, except the specific tort of infringement of a statutory copyright. *Parissi v. General Electric Co.* (N.D.N.Y. 1951) 97 F.Supp. 333; *Muse v. Mellin* (S.D.N.Y. 1962) 212 F. Supp. 315 and authorities cited. cf. *Republic Pictures Corp. v. Security First National Bank* (CCA 9 1952) 197 F(2d) 767. State remedies are not precluded merely because a federally created monopoly is the subject of the action. *Becher v. Contoure Laboratories* (1927) 279 U.S. 388, 73 L.Ed. 752, 49 S.Ct. 356,

cf. *Radio Station WOW v. Johnson* (1944) 326 U.S. 120, 89 L.Ed. 2092, 65 S. Ct. 1475.

D. The holding that the tortious interference doctrine is not applicable to contracts dealing with copyrighted articles is contrary to *Meyer v. Wash Times* (Ct. App. D.C. 1935) 76 F(2d) 988; *New York Phonograph Co. v. Jones* (Cir. Ct. N.Y. 1903) 123 Fed. 197; *New England Phonograph Co. v. Edison* (Cir. Ct. D.N.J. 1901) 110 Fed. 26, and *New York Phonograph Co. v. National Phonograph Co.* (Cir. Ct. S.D.N.Y. 1902) 112 Fed. 822, and the holding that such doctrine is not applicable where the subject of the contract is property other than copyrighted material, is contrary to *Capitol Records v. Mercury Records, supra; Ettore v. Philco, supra,* and *Uproar v. NBC et al.* (D.C. Mass. 1934) 8 F.Supp. 358, modified and affirmed (1936, CCA 1) 81 F(2d) 373, cert. den. 298 U.S. 670, 80 L.Ed. 1393, 56 S. Ct. 835.

E. *Sears* and *Compco* do not prohibit the application of the doctrine of tortious interference with contractual relationships where the subject matter of the contract is not in the public domain.

Respectfully submitted this 10th day of August, 1964.

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CERTIFICATE OF COUNSEL

This is to certify that the within and foregoing petition is filed in good faith, and not interposed for delay, and that in the preparation and filing of this petition I have examined the Rules of the United States Court of Appeals for the Ninth Circuit, as reported in 28 U.S.C.A. 483-490, and that in my opinion the said brief is in full compliance with said rules.

/s/ George M. McMillan